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No. _____

In The

Supreme Court of the United States

October Term, 1995

ALASKA FEDERATION OF NATIVES,

Cross-Petitioner,

v.

UNITED STATES OF AMERICA, BRUCE BABBITT, SECRETARY OF THE INTERIOR, DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, FRANK RUE, COMMISSIONER, ALASKA DEPARTMENT OF FISH AND GAME, and STATE OF ALASKA.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States' navigational servitude constitutes an interest in waters, title to which is in the United States, within the definition of "public lands" in the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3102(1)-(3), so that all navigable waters in Alaska are impressed with the priority for subsistence fishing mandated by §§ 803-805 of ANILCA, 16 U.S.C. §§ 3113-3115?

LIST OF PARTIES

In addition to the parties listed in the caption on the cover page, private respondents Katie John, Doris Charles and the Mentasta Village Council were parties to the proceedings below.

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CROSS-PETITION FOR WRIT OF CERTIORARI

The Alaska Federation of Natives respectfully cross-petitions for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Ninth Circuit. Cross-petitioner requests that this petition be granted irrespective of the Court's disposition of the petition filed by the State of Alaska, No. 95-1084.[1]

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1) is reported at 72 F.3d 698 (Dec. 19, 1995), *superseding* 54 F.3d 549 (April 20, 1995). The district court's opinion is unreported, Nos. A90-0484 & A92-0264-CV (HRH), 1994 WL 487830 (D. Alaska, March 30, 1994), and is reproduced in the Supplemental Appendix ("Pet. Supp. App.") filed by petitioner in No. 95-1084.

[1] The Indians, Eskimos and Aleuts of Alaska originally established the Alaska Federation of Natives (AFN) as the lead statewide Native organization to advocate for settlement of Native land claims based on aboriginal use and occupancy. Since its formation in 1966, AFN has continued to advocate for Alaska Native hunting and fishing rights, and in this capacity was permitted to intervene as a defendant and to file a cross-claim against the federal defendants in *State of Alaska v. Babbitt*, No. A92-0264-CV (HRH) (D. Alaska), which was consolidated in the district court and on appeal with *Katie John v. United States*, No. A90-0484-CV (HRH).

JURISDICTION

The district court's decision was entered March 30, 1994. Pet. Supp. App. 1-50. The opinion and judgment of the Court of Appeals for the Ninth Circuit was filed on December 19, 1995. 72 F.3d 698 (Dec. 19, 1995) (Pet. App. 1), *superseding* 54 F.3d 549 (April 20, 1995). The State of Alaska's petition for a writ of certiorari (No. 95-1084) was filed on January 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the State of Alaska's petition for a writ of certiorari. Pet. 1-3.

STATEMENT OF THE CASE

This case concerns whether the geographic scope of the federally protected subsistence hunting and fishing rights secured by Title VIII of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3111-3126 ("ANILCA"), encompasses all navigable waters in Alaska (as the district court held) or only federal reserved waters (as the Ninth Circuit held). The geographic scope of Title VIII's subsistence priority turns on the proper construction of the term "public lands," 16 U.S.C. § 3102(3), and the words "lands, waters, and interests therein," § 3102(1), "title to which is in the United States." § 3102(2).

The private plaintiffs and cross-petitioner AFN commenced this litigation to establish that (1) "public lands" under ANILCA include the federal government's reserved water rights appurtenant to federal reservations in Alaska (as confirmed below by the Ninth Circuit, 72 F. 3d at 703-704 (Pet. App. 11-12)), and (2) the navigational servitude of the United States renders all navigable waters in Alaska "public lands" (as held by the district court, Pet. Supp. App. 34-43). This cross-petition seeks review of the Ninth Circuit's reversal of the district court's determination that the United States' navigational servitude is an "interest" in "lands" or "waters" "title to which is in the United States" within the meaning of ANILCA, and that Title VIII's subsistence priority to hunt and fish on public lands in Alaska therefore extends to such navigable waters.

The statutory framework and background, the events giving rise to this litigation, and the proceedings below, are set forth in the Private Respondents' Brief in Opposition, No. 95-1084 (March 6, 1996).

REASONS FOR GRANTING THE CROSS-PETITION

I. Whether the Federal Government's Navigational Servitude is a Sufficient "Interest" in Waters for Purposes of ANILCA's Subsistence Fishing Provisions is an Issue of Critical Importance to the Survival of Alaska Native Villages

The court of appeals rather summarily rejected the district court's well-reasoned conclusion (Pet. Supp. App.

34-43) that the navigational servitude is a sufficient interest of the United States in the navigable waters of Alaska to bring those waters within ANILCA's definition of "public lands." Instead, the Ninth Circuit, while agreeing that federal reserved waters appurtenant to federal reservations in Alaska are covered by ANILCA, adopted a narrow construction of the "public lands" definition in ANILCA, and held that the navigational servitude does not constitute "public lands" on the apparent grounds that the United States does not hold "title" to the navigational servitude and/or that it is not an "interest" in navigable waters. 72 F.3d at 702, Pet. App. 9. In so holding, the court denied any meaningful protection for Alaska Native subsistence fishing in many areas of rural Alaska.

The proper construction of "public lands" is of critical import to Alaska Native villages, for any decision limiting the geographic scope of their subsistence priority threatens their survival and traditional way of life. Indeed, the decision below forecloses any protection at all for Native village subsistence fishing activities in all of Alaska's coastal waters, and in many inland rivers and streams that are not reserved as part of the various federal reservations Congress has set aside. This grave threat is hardly theoretical, for most Native villages in Alaska are extremely remote and are located on navigable rivers or along the coasts of the North Pacific and Arctic Oceans. Their proximity to water is no accident and

reflects the direct dependence of villagers on ready access to fish stocks for their daily sustenance.[2]

The importance of subsistence to Alaska Natives was not lost on Congress when it enacted ANILCA. After holding extensive hearings throughout rural Alaska, the House Committee on Interior and Insular Affairs recognized that "[t]here are more than two hundred rural communities throughout Alaska. In many, fresh meat, *fish* and produce are unavailable except through the subsistence harvest." H. REP. NO. 1045, 95th Cong., 2d Sess., Part I, 182 (1978) (emphasis added). Congress accordingly declared that "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is *essential* to Native physical, economic, traditional, and cultural existence. . . . " 16 U.S.C. § 3111(1) (emphasis added). That Congress was intent on protecting subsistence fishing is obvious in Title VIII, which mentions fish or fishing no fewer than twenty times. *See also, e.g.*, 126 CONG. REC. 29280 (1980) (Rep. Udall).

Throughout Title VIII's development Congress made note of the dependence of rural Native villages on subsistence fishing, at times even naming many of the villages,[3] very few of which are located within or near federal refuges, parks, national forests, and the like (which have reserved waters). It simply makes no sense that Congress

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[2] "About 65% of the State's subsistence harvest by weight is fish." Robert Wolfe, *Myths: What Have You Heard?*, Alaska Dept. of Fish and Game 21 (Nov.-Dec. 1989).

[3] *See, e.g.*, S. REP. NO. 413, 96th Cong., 1st Sess. 233 (1979), *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 5070, 5177.

would have specifically intended to protect Native subsistence fishing rights and yet restrict the subsistence preference to those relatively few inland waters that flow through national parks and refuges. Since the Ninth Circuit concluded that the plain language of the statute is not dispositive (72 F.3d at 702 (Pet. App. 8-9)), it should have adhered to this Court's longstanding admonition that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *South Dakota v. Bourland*, 508 U.S. 679, ___, 113 S. Ct. 2309, 2316 (1993) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)).[4]

Unless this Court reverses the decision below, most Native subsistence users dependent upon fish as the mainstay of their livelihood will be denied the protections enacted by Congress that are essential to their traditional way of life. As the Ninth Circuit has put it, "[i]f

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[4] The provisions of Title VIII and the "public lands" definition must be considered in light of " 'the provisions of the whole law, and its object and policy.' " *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 450 (1993). "The subsistence-protection provisions [of ANILCA]," in particular, "must be viewed in the context of the Act as a whole." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 549 (1987). The court below failed to do so, and thus failed to consider "the mischief at which [the statute] was aimed and the object it was supposed to achieve." 2A SUTHERLAND STATUTORY CONSTRUCTION, § 48.03 (C. Sands 5th ed. 1992).

their right to fish is destroyed, so too is their traditional way of life."[5]

II. The Ninth Circuit's Construction of ANILCA's "Public Lands" Definition Conflicts With this Court's Holding in *Amoco v. Village of Gambell*

In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987) (involving the nature of the federal government's interests in the outer continental shelf), this Court construed ANILCA's "public lands" provision to include both technical full fee title and lesser "interests," as expressly provided for in the statute. *Id.* at 548. The Court "reject[ed] the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." *Id.* at 548

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[5] *Native Village of Quinhagak v. United States*, 35 F.3d 388, 394 (9th Cir. 1994), *quoting United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991). As noted in another context:

> The maintenance of this subsistence economy is requisite to the literal survival of these isolated Alaskan tribal villages. . . . [E]ven if the community's physical survival is not placed in immediate jeopardy by disruptions from oil and gas exploration, the very social structure of the village is jeopardized. A reduced availability of naturally recurring resources . . . alter[s] the depth, breadth and strength of the clans, the organizational core of society." Subsistence is nothing less than "a symbolic and organizational base for their spiritual life."

People of the Village of Gambell v. Hodel, 774 F.2d 1414, 1425 (9th Cir. 1985), *rev'd sub nom. on other grounds, Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987).

n.15. Rejecting the notion that ANILCA's "title" to "interests" refers only to full fee title, or some technical record or deed title, this Court adhered to ANILCA's plain meaning, concluding that the United States holds sufficient "title" to "interests" in the Outer Continental Shelf to satisfy ANILCA's "public lands" definition:

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States."

Id.[6] Thus, in conformity with the statute's plain language, the Court concluded that the United States need not hold fee simple title to lands or waters. Rather, it need only own some "interests" in the lands or waters to bring them within the definition of "public lands" and thus the subsistence protections of Title VIII.

In interpreting ANILCA's definition of "public lands" narrowly so as to exclude all but federally reserved navigable waters from Title VIII's geographic scope, 72 F.3d at 702 (Pet. App. 9), the Ninth Circuit failed to adhere to this Court's caution that the meaning of "geographic terms" that do not have "precise geographic/political meanings" must "be derived from their context in the statutes." *Gambell*, 480 U.S. at 547 n.14. As

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[6] The Court went on to hold that despite that ruling, the OCS is not situated "in Alaska" and for that reason is not covered by ANILCA Title VIII's protections.

the Ninth Circuit had previously recognized without disapproval by this Court, the statutory context of the protections afforded by Title VIII's provisions is that they were meant " 'to be co-extensive with the extinguishment of aboriginal rights that made those measures necessary.' " *Id.* at 537, *quoting People of the Village of Gambell v. Clark*, 746 F.2d 572, 579-80 (9th Cir. 1984).

From statehood to the present Congress has endeavored to protect the hunting and fishing activities of Alaska Natives. In the wake of this Court's decision in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), section 4 of the Alaska Statehood Act preserved for future action by Congress all Native aboriginal rights to hunt and fish throughout the State. Act of July 7, 1958, 72 Stat. 339, as amended, 73 Stat. 141. Plainly those aboriginal uses included subsistence fishing in the navigable rivers and coastal waters of ancestral Native villages. When state land selections under the Act nonetheless threatened those rights, the Secretary of the Interior imposed a land freeze pending further congressional action. *Public Land Order* 4582, 34 Fed. Reg. 1025 (1969); *see Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1960), *cert. denied.*, 308 U.S. 1076 (1970). When Congress in the 1971 Alaska Native Claims Settlement Act[7] next extinguished all Native aboriginal hunting and fishing rights "in Alaska," *Gambell*, 480 U.S. at 530 (including in all navigable waters), it instructed the Secretary and the State "to take any action necessary to protect the subsistence needs of

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[7] 43 U.S.C. §§ 1601, 1603(b).

the Natives."[8] And, when both failed to act, Congress responded with Title VIII of ANILCA, in order to protect the same fishing and hunting rights that had previously been extinguished in the Settlement Act. Thus, the very same Native aboriginal hunting and fishing rights protected under the Statehood Act, and extinguished under the Settlement Act on the expectation the Secretary and the State would take protective action, now find protection in Title VIII. That is the "context," 480 U.S. at 548, from which the meaning of the geographic term "public lands" must be derived.

In its perfunctory rejection of the district court's holding and cross-petitioner's argument that the navigational servitude is an interest in navigable waters, title to which is in the United States, 72 F.3d at 702-03 (Pet. App. 9-10), the Ninth Circuit disregarded the statutory context of the term "public lands," and ascribed no meaning at all to the term "interests" in "waters." This is contrary to the approach taken by this Court in *Gambell*. Indeed, as explained next, the navigational servitude is an interest of the United States in navigable waters that is at least equal in stature to the Nation's interests in the submerged lands of the Outer Continental Shelf at issue in *Gambell*. And the United States surely has "title" to the interests in navigable waters flowing from the navigational servitude in the most fundamental and decisive sense – the absolute power of disposition and control. The Ninth Circuit's decision is thus in conflict with this Court's *Gambell* opinion with respect to an issue of compelling importance to

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[8] CONF. REP. NO. 92-746, 92d Cong., 1st Sess. 37, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2247, 2250.

the continuation of the Alaska Native subsistence way of life, a way of life that Congress explicitly declared to be in the national interest and sought to promote.

III. The Decision Below Misconstrues the Nature of the United States' "Interests" in Navigable Waters by Virtue of the Navigational Servitude

A. The Navigational Servitude is an Interest in Waters Owned by the United States

The navigational servitude is an easement and therefore an interest in real property.[9] *United States v. Grand River Dam Auth.*, 363 U.S. 229, 231-32 (1960) ("the United States has a superior navigation easement which precludes private ownership of the water or its flow. . . . "); *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956) (Congress may appropriate the flow of a river to the exclusion of any conflicting or competing interest); *Montana v. United States*, 450 U.S. 544, 555 (1981) (the navigational servitude is an easement reserved for the benefit of the public); *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 706 (1987) (referring to the servitude as a " '*navigational easement*,' " *quoting Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970) (emphasis in original)).

Navigable waters are the "*public property* of the nation." *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1865) (emphasis added); see also, *United States v.*

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[9] "The term 'servitude' used in the civil law is roughly equivalent to 'easement' in the common law. . . . " 2 G. Thompson, REAL PROPERTY 8 (J. Grimes repl. 1961).

Rands, 389 U.S. 121, 123 (1967); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967). The navigational servitude is derived from the public's right to use navigable waterways for navigation and commerce, and is a property interest that correspondingly reduces the property interests of riparian owners:

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a *public navigable water*, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. *It is a qualified title, a bare technical title*, not at his absolute disposal, as is his upland, to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the *public right of navigation*.

Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (emphasis added); see also *Gibson v. United States*, 166 U.S. 269, 271-72 (1897); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913); *Kaiser Aetna v. United States*, 444 U.S. 164, 186 (1979) ("The National Government is guardian of a public right of access to navigable waters of the United States").

The court below misconstrued the nature and source of the federal government's "interests" in waters, ruling that the United States could not own title to waters or interests therein because the servitude is derived from

the Commerce Clause[10] and is thus a "concept of power, not of property." 72 F.3d at 702 (Pet. App. 9) (quoting *United States v. Certain Parcels of Land*, 666 F.2d 1236, 1238 (9th Cir. 1982), citing *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956)). Even assuming the power/property dichotomy has some significance, the appellate court failed to recognize that the servitude is an interest in waters by virtue of its proprietary nature as public property, held in trust by the national government for the benefit of the Nation and its economy.[11] *The Daniel Ball*,

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[10] U.S. CONST. art I, § 8 cl. 3: "The Congress shall have the power: . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes. . . ."

[11] The Ninth Circuit has not been consistent in its treatment of the servitude. In *Boone v. United States*, 944 F.2d 1489, 1494 n.9 (9th Cir. 1991), the court acknowledged that "the label, 'servitude' implies a property interest." Yet in *City of Angoon v. Hodel*, 803 F.2d 1016, 1028 n.6 (9th Cir. 1986), *cert. denied*. 484 U.S. 870 (1987), the Ninth Circuit stated that the United States does not hold title to the navigational servitude, *citing United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961) (servitude is "power of government to control and regulate navigable waters in the interest of commerce") (quoting *United States v. Commodore Park*, 324 U.S. 386, 390 (1945)). Beyond offering the quoted language, the court of appeals did not further discuss either case. But neither decision holds that the navigational servitude is not an interest in water, and *Virginia Electric* specifically refers to the servitude as an "easement." While neither decision explicitly holds that the United States has title, each analyzes the navigational servitude as both a geographically-defined property interest, dominant over all other interests, and as a vehicle for regulation under the Commerce Clause. *Virginia Elec.*, 365 U.S. at 627 (the court referred to the "navigational servitude – sometimes referred to as a 'dominant servitude,' . . . or a 'superior navigation easement . . . ' "); *Commodore Park*, 324 U.S. at 391

77 U.S. (10 Wall.) 557 (1870); *The Eagle*, 75 U.S. (8 Wall.) 15 (1868); *The Hine*, 71 U.S. (4 Wall.) 555 (1866).

B. The Servitude's Character as Property is Confirmed by the Absence of any Duty to Pay Just Compensation to Riparian Land Owners

The power to regulate navigation confers upon the United States a "dominant servitude," *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), or a "superior navigation easement." *United States v. Grand River Dam Auth.*, 363 U.S. 229, 231 (1960). The navigational servitude is "dominant" because it includes the right to displace vested property rights without benefit of Fifth Amendment compensation. The riparian owner has property rights in the stream which are protected against third parties, but such rights are burdened by the federal government's servitude. As a consequence, the exercise of the government's right does not constitute a taking. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *United States v. Twin City Power Co.*, 350 U.S. 222 (1955). Whatever interests riparians may have or claim in the bed or banks of a stream below ordinary high water mark are thus non-compensable. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

("[r]espondent's property was always subject to a dominant servitude . . . ," and his "fast lands [were] left uninvaded, [he] ha[d] no private riparian rights . . . , for which rights the government must pay.").

Since the navigational servitude is owned by the United States, the government need not pay compensation for the simple reason that the government can not be compelled to pay for what it already owns. Indeed, the federal government's interest in the navigational servitude is so broad that it has been invoked to destroy bridges, piers, tunnels, rights of access and riparian land values, all without compensating private owners.[12] As commentators have noted,

> [t]he incidents of the federal interest [in navigable waters] have been developed to the point where its proprietary character is quite clear and . . . continued attempts to deal with it solely under the commerce clause are both unnecessary and misleading. The interest should be recognized for what it is and be dealt with in the context of the property clause of the Constitution."

Bartke, *The Navigation Servitude and Just Compensation – Struggle for a Doctrine*, 48 OR. L. REV. 1, 2 (1968); see also, Munro, *The Navigation Servitude and the Severance Doctrine*, 6 LAND AND WATER L. REV. 491, 503 (1971) (the navigational servitude is "in effect ownership of the entire stream flow"). The district court correctly concluded below that "the character of the navigational servitude establishes . . . that the servitude is not always

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[12] *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) (value of riparian land as a hydroelectric site held not compensable); *United States v. Commodore Park*, 324 U.S. 386 (1945) (pier); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907) (bridge); *West Chicago Street R.R. v. Chicago*, 201 U.S. 506 (1906) (tunnel under river).

accurately described as just a power. For purposes of ANILCA Title VIII, the navigational servitude is more properly characterized as an interest in waters." Pet. Supp. App. 39. The Ninth Circuit erred in rejecting this proposition.

CONCLUSION

For the foregoing reasons the Alaska Federation of Natives' cross-petition for a writ of certiorari should be granted.

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